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IN THE

Supreme Court of the United States

October Term, 1959.
No. 873.

JAMES A. GAINEY and J. L. YOUNG, Individually and on Behalf of Others Similarly Affected,
Petitioners,

v.

THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
and
THE PENNSYLVANIA RAILROAD COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	11
Appendix A (Opinion of the United States District Court for the Eastern District of Pennsylvania)	13
Appendix B (Opinion of the Circuit Court for the Third Circuit)	32
Appendix C (Circuit Court Order Denying Rehearing	38
Appendix D (45 U. S. C. Annotated 151 et seq.) Railway Labor Act	39
(1) Section 152 Seventh	39
(2) Section 153 First (a) (b) (c) (g) (i)	39, 40
(3) Section 153 Second	41
(4) Section 155 First (a)	41
(5) Section 156	41

PAGE

Appendix E (29 U. S. C. Annotated 401 et seq.) Labor-Management Reporting and Disclosure Act of 1959 42

Appendix F Constitutional Provision—Fifth Amendment 43

Appendix G Complaint and Amendment 43

Appendix H (Petition for Clarification of Judgment, Directing Lower Court to allow Plaintiffs to amend their Complaint) 54

Appendix I Statutory authority for appeal 75

TABLE OF CASES CITED

Conley v. Gibson, 355 U. S. 41 ..... 4, 11

Elgin v. Burley, 325 U. S. 711 ..... 5, 6, 8

Hunter v. Atchison T. & S. F. Ry. Co., 171 F. (2d) 594 7th Circuit 6

Order of Ry. Conductors v. Southern Ry., 339 U. S. 255 7

Pa. R. Co. v. Day, 360 U. S. 548 (1949) 4, 5, 7

Slocum v. Delaware L. & W. R. Co., 339 U. S. 239 ..... 4, 7

State of California v. Taylor, 353 U. S. 553 (1957) 5

Steele v. Louisville & N. R. R., 323 U. S. 192 ..... 4, 8, 9

Thomas v. N. Y. Chicago & St. Louis R. Co., 185 F. (2d) 614, 6th Circuit 6

Trainmen v. Chicago R. & I. R. Co., 353 U. S. 30 (1957) 6

Tumey v. Ohio, 273 U. S. 510 9

Tunstall v. Brotherhood of L. F. & E., 323 U. S. 210 ..... 4, 9, 10, 11

Union Pacific R. Co. v. Price, 360 U. S. 601 (1959) ... 4, 5, 7

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CITATION TO OPINIONS BELOW.

The opinion of the District Court, printed as Appendix A page 13 is reported at 177 F. Supp. 421. The opinion of the Court of Appeals is printed as Appendix B page 32, and is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered February 24, 1960, and its denial of a Petition for Rehearing and for an Order Clarifying its Judgment, Directing the Lower Court to Allow Plaintiffs to Amend Their Complaint, was entered on March 23, 1960.

This petition for a Writ of Certiorari was filed less than 60 days after the entry of the judgment below.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254 (1). (Appendix I.)

QUESTIONS PRESENTED.

1. Where a wage agreement involving bonus payments is in existence, and a carrier and a union negotiate a new agreement the terms of which are more favorable to the workers, and the carrier with the tacit consent of the union unilaterally terminates the existing agreement and refuses to place in effect the new one, is this a dispute over which the National Railroad Adjustment Board has primary jurisdiction or is it one cognizable in a United States District Court?

2. In the cause of action in the instant case, where the employees charge their union with discrimination in violation of the Railway Labor Act, alleging that the union refused to heed this complaint for ten years, does the Railway Labor Act require these workers to exhaust internal union remedies before seeking judicial relief?

STATUTES INVOLVED.

The pertinent provisions of the Railway Labor Act, 45 U. S. C. are Sections 152 Seventh, 153 First (a) (b) (c) (g) (i); 153 Second, 155 First (a), 156, set forth in Appendix D page 39.

Labor-Management Rep. and Discl. Act of 1959 (29 U. S. C. A. 401) Appendix E page 42.

STATEMENT OF THE CASE.

In 1941 The Brotherhood of Railway and Steamship Clerks, Etc., Petitioners' statutory representative, and the Pennsylvania Railroad placed in effect an agreement which provided bonuses over and above hourly rated compensation for Tallymen on the Eastern Region of the Pennsylvania Railroad (52-53).

In 1949 the carrier and the Brotherhood negotiated again regarding this collective bargain; this time the Eastern Region Tallymen were to receive monthly salaries equal to those paid tallymen in the Central Region ($269.17) with the same fringe benefits of annual paid vacation and sick leave (53).

However, in 1950 the carrier unilaterally terminated the existing agreement as to bonuses and did not place in effect any equalization of pay agreement, thus relegating the Petitioners to the inferior earnings of 1941 (54).

Petitioners protested this action to the carrier. It was ignored. Petitioners sought to have their union protest the action of the carrier. The union not only refused to process this dispute as provided by the Railway Labor Act or to seek judicial relief, but it punished the Petitioners for their efforts to redress this wrong by dissolving their locals in the Eastern Region (50-68).

To this day, Petitioners are hourly rated employees, earning less money than their counterparts in this craft on other

regions of the Pennsylvania Railroad. To date, because the Pennsylvania Railroad and the Brotherhood have failed to put into effect a new salary equalization agreement, the Petitioners have suffered earning losses in excess of $2,000,000 (49-50).

After waiting ten years for their union to redress this statutory violation, the Petitioners representing a class of 600 workers brought this action against their union and the carrier in the District Court for the Eastern District of Pennsylvania, seeking injunctive relief and damages.

The defendant railroad filed a motion to dismiss, alleging, inter alia, that exclusive jurisdiction of this problem was in the National Railroad Adjustment Board and that the Plaintiffs had failed to exhaust their administrative remedies.

The defendant union filed a motion to dismiss, raising the same jurisdictional question as the carrier, and said further that the Petitioners had not exhausted internal union remedies.

The District Court made a factual finding on the basis of the complaint and held no new collective bargain had been made; but that in any event the problem was one of *interpretation of an agreement* for which the Railway Labor Act had a remedy: the National Railroad Adjustment Board, citing *Pa. R. Co. v. Day*, 360 U. S. 548 (1959) and *Union Pac. R. Co. v. Price*, 360 U. S. 601 (1959).

The District Court said that even if a new collective bargain had been consummated, the court could not have jurisdiction. It then reviewed the discrimination cases and rejected the following authorities as being inapplicable: *Steele v. Louisville & N. R. R.*, 323 U. S. 192 (1944); *Tunstall v. Brotherhood of L. F. & E.*, 323 U. S. 210 (1944); *Conley v. Gibson*, 355 U. S. 41 (1957). Instead, the District Court cited *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950), for the proposition that Petitioners had failed to exhaust statutory remedies.

As to the union, the District Court held that Petitioners had failed to exhaust internal union remedies as a prerequisite to judicial relief. Thus the Complaint was dismissed. 177 F. Supp. 421.

The Third Circuit Court of Appeals affirmed the lower court, reiterating that the collective bargain as such was for the court to determine from the Complaint, but that in any event it was a question of interpretation or application of an agreement and hence a problem for the National Railroad Adjustment Board, citing the *Day* and *Price* cases (supra). It also said that Petitioners had failed to exhaust internal union remedies and hence were out of court on that point.

Petitioners petitioned the Circuit Court for rehearing and for Clarification of Judgment, to allow them to file an amended Complaint. This was denied.

Thus both courts below hold that a District Court has no jurisdiction over a class action against a statutory representative *and* a carrier where a wage agreement is terminated without first putting into effect a new collective bargain.

REASONS FOR GRANTING THE WRIT.

1. The District Court of the Eastern District of Pennsylvania and the Third Circuit Court of Appeals have decided an important federal question, involving the interpretation of a federal statute directly in conflict with decisions of the Sixth and Seventh Circuits.

The doctrine has been well established since *Elgin v. Burley*, 325 U. S. 711 (1945) that a "minor" dispute in the railroad industry involves the interpretation or application of an *existing* agreement; and hence under the Railway Labor Act such a dispute has its primary jurisdiction in the National Railroad Adjustment Board. *State of California v. Taylor*, 353 U. S. 553 (1957).

Accordingly, the "major" disputes—those dealing with the making of the actual collective bargain—are left to the carriers and statutory representatives to negotiate, failing which the Railway Labor Act provides for Mediation, Conciliation and Arbitration.

Thus, in *Hunter v. Atchison T. & S. F. Ry. Co.*, 171 F. (2d) 594 (1948), Seventh Circuit, the court said at page 599:

> "In reality what the (National Railroad Adjustment) Board did was not merely to exercise its statutory authority to interpret or apply the contract as it existed, but to make a new and different contract between the brakemen and the carrier" (reversed on other grounds).

And in *Thomas v. N. Y. Chicago & St. Louis R. Co.*, 185 F. (2d) 614 (1950), Sixth Circuit, the court said at page 617:

> "Although the National Railroad Adjustment Board has jurisdiction to hear an individual's grievance, it is not authorized to write a contract for parties nor to create substantive legal rights."

The lower courts in the instant case failed to distinguish between "minor" and "major" disputes, and perceiving the question as one involving the interpretation of a contract, relegated the Petitioners to the National Railroad Adjustment Board for relief.

Clearly the lower courts are out of step with the Sixth and Seventh Circuits, and the decisions of these lower courts should be reviewed by this Court.

2. Though this Court has not faced a factual situation calling for a judicial determination of whether a dispute in the railroad industry was "major" or "minor", nevertheless it has laid down the doctrinal distinction in *Elgin v. Burley*, 325 U. S. 711 (1945), holding that "minor" disputes must be relegated to the National Railroad Adjustment Board. Thus the lower courts here have failed to apply the *Elgin* doctrine to the instant facts. *Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30 (1957).

Fundamentally the question and this conflict involves whether or not, after negotiating a new wage agreement, a carrier may unilaterally terminate the old agreement with-

out putting into effect the new one, thereby depriving railroad workers of the benefits of the old as well as the new agreement.

Circuit Judge Goodrich utterly failed to distinguish between "major" and "minor" disputes in the railroad industry when he said at page 33:

> "The plaintiffs, themselves, acknowledge that disputes between carriers and their employees as to interpretation of existing agreements must be referred to the National Railroad Adjustment Board. Plaintiffs argue that this litigation does not involve an interpretation of an existing agreement . . . If plaintiffs have any claim at all against the Railroad it must be because of existing 'agreements' between the Brotherhood and the Railroad; the allegation that the Brotherhood has permitted the Railroad to ignore the 'agreements' does not remove this case from the Board's jurisdiction."

Thus Judge Goodrich, affirming the lower court, found that *Slocum v. Delaware, L. & W. R. R.*, 339 U. S. 239 (1950), and *Order of Ry. Conductors v. Southern Ry.*, 339 U. S. 255 (1950), applied, and determined that this question of *collective bargaining* was for the National Railroad Adjustment Board.

If this decision is allowed to stand, it means that no railroad worker in this Circuit may seek judicial relief where a carrier, with the tacit consent of the statutory representative, abrogates an existing wage agreement and fails to replace it with another contract.

Both lower courts cited *Pennsylvania R. R. v. Day*, 360 U. S. 548 (1959) and *Union Pac. R. R. v. Price*, 360 U. S. 601 (1959) as applicable to the instant dispute. In doing so the courts took the view that *any* dispute must be heard by the National Railroad Adjustment Board. Actually the *Day* and *Price* cases (supra) stand for the narrow proposition that where the interpretation or application of an existing agreement is in question, irrespective of the status of

the employment relation, the problem must be resolved by the Board.

The lower courts, failing to apply the doctrine of the *Elgin* case (supra) treated this complaint as a suit for damages and injunctive relief involving the interpretation or application of an existing agreement.*

For this complete disregard of the doctrine of the *Elgin* case (supra) this Court should review the judgments of the courts below, for clearly these courts have placed a statutory construction on the instant dispute inconsonant with the intent of Congress and the decisions of this court.

3. The dispute presented here presents a pressing cause for review of the lower courts' decisions, since those courts hold that a complaint by a railroad worker against an employer *and* a statutory representative must be taken to a tribunal the membership of which is determined by the very parties whose actions are being protested. Section 153. First. (a) (b) and (c) of the Railway Labor Act provide for the method of selecting members of the National Railroad Adjustment Board. Both the Pennsylvania Railroad and the Brotherhood of Railway and Steamship Clerks have representatives on this tribunal, and the salaries of these representatives are paid by this carrier and this brotherhood. Moreover the respondents have established their own Regional Board in accordance with Section 153. Second. Requiring this class of Petitioners to present their complaint to these tribunals would be in direct conflict with the Due Process Clause of the Fifth Amendment to the federal constitution. This constitutional question has not been resolved by this Court.

However, this Court did say in the *Steele* case (supra) at page 206:

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* The courts had a clear understanding of the factual dispute as averred in the complaint. See Circuit Judge Goodrich's summary of the facts at page 33 of the appended opinion.

"We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy, CF. *Tumey v. Ohio*, 273 U. S. 510."

4. The lower courts' decisions must be reviewed for another cogent reason. This Court said in *Steele v. L. & N. R. Co.*, 323 U. S. 192, page 205:

"Section 3, First (i) which provides for reference to the Adjustment Board of 'disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements' makes no reference to disputes between employees and their representatives. Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, *that Board could not give the entire relief here sought.*"

Obviously this Court in the *Steele* case refused to relegate the complainants to the National Railroad Adjustment Board because it could not afford complete relief, since there the complaint was against *both* a carrier and a brotherhood. Thus this Court construed the statute as providing relief before this tribunal only where a carrier is a defendant, and that this tribunal is unable to afford complete relief against a carrier *and* a brotherhood, and therefore there is no statutory authority for giving the National Railroad Adjustment Board jurisdiction over such a dispute.

If we apply this statutory construction to the instant case, it becomes all the more apparent why the decisions of the lower courts must be reviewed by this Court since they are glaringly in conflict with *Steele* (supra) and *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, decided at the same term on the same issues.

5. The opinion of the Circuit Court is erroneous and should be reviewed by this Court for still another reason:

the court in affirming the lower court held that Petitioners should have exhausted internal union remedies or at least should have averred what remedies had been exhausted before applying for judicial relief against their union. Judge Goodrich cited the *Tunstall* case (supra) for this proposition. The *Tunstall* case, however, speaks of administrative remedies available under the Railway Labor Act, and makes no direct or indirect reference to internal union remedies.

Moreover, Petitioners averred in their complaint that this dispute had gone unheeded by all echelons of the Brotherhood since 1951. And in the proposed amended complaint which the lower court refused Petitioners leave to file, there were additional averments of the intra-union procedures Petitioners employed hoping to gain redress of this wrong, to no avail.

It is submitted that the lower courts have ignored the strong legislative policy laid down by Congress in the new Labor Management Reporting and Disclosure Act of 1959. Public Law 86-257, 86th Congress, S. 1555, September 14, 1959 (73 Stat. 519). Section 101 (a) (4) holds that a union member need not exhaust internal union procedures beyond a four month period before seeking judicial relief.

Petitioners averred in the Complaint below that their pleas for help addressed to the union went unheeded for ten years. The holdings of the courts below are obviously contrary to the new Congressional policy.

Even if the lower courts wanted to ignore the new act of Congress on the theory that it was inapplicable to a dispute which arose prior to its enactment, the decisions of those courts should be reviewed since they place an unwholesome advantage in the statutory representative and clearly conflict with the view of this court in the *Steele* case (supra) where this Court faced with a similar factual situation said (page 196):

> "Protests and appeals of petitioner and his fellow Negro firemen, addressed to the railroad and the

Brotherhood in an effort to secure relief and redress have been ignored."

The opinions of the lower courts fail to mention this new Congressional labor policy; they ignore the ten year period Petitioners waited before seeking judicial relief; they do not suggest how many more years Petitioners should plead with their statutory representative for relief. The opinions blithely hold that Petitioners have not exhausted internal union remedies and hence their complaint is premature.

Thus, on the horns of a dilemma, the courts dismiss the complaint as to the union first by ignoring *Conley v. Gibson*, 355 U. S. 41 in which this court said that union members could seek judicial relief against their statutory representative when it violated its duty, and then to strengthen the dismissal of the complaint cite the *Tunstall* case for the proposition that union members must first exhaust internal union remedies before applying to the court for relief. For this misapplication of the doctrine of these cases, this Court should review the opinions of the courts below. Since Congress was silent on this problem in the Railway Labor Act —assuming that the new labor act is inapplicable—the decisions of the lower courts are ripe for review by this Court to determine whether or not the Railway Labor Act intended that an employee who is aggrieved by his union's acts of omission or commission must first exhaust intra-union remedies before seeking judicial relief; and in the instant case, whether ten years' waiting is sufficient.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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